

# Order

Michigan Supreme Court  
Lansing, Michigan

March 11, 2022

Bridget M. McCormack,  
Chief Justice

160775

Brian K. Zahra  
David F. Viviano  
Richard H. Bernstein  
Elizabeth T. Clement  
Megan K. Cavanagh  
Elizabeth M. Welch,  
Justices

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

SC: 160775  
COA: 332081  
Wayne CC: 15-005481-FH

JOEL EUSEVIO DAVIS,  
Defendant-Appellant.

---

On October 7, 2021, the Court heard oral argument on the application for leave to appeal the November 12, 2019 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CLEMENT, J. (*dissenting*).

I dissent from the Court's order denying leave to appeal. Under our recent decision in *People v Wafer*, \_\_\_ Mich \_\_\_ (2022) (Docket No. 153828), defendant's convictions for aggravated domestic violence, MCL 750.81a(3), and assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84(1)(a), are incompatible. Defendant's conviction for aggravated domestic violence should therefore be set aside.

I believe this case should be controlled by *Wafer*. In *Wafer*, the defendant was convicted of second-degree murder, MCL 750.317, and one of the elements of murder is that the defendant acted with malice, see *People v Goecke*, 457 Mich 442, 463-464 (1998). We held that a defendant found guilty of murder (and who therefore acted *with* malice) could not also have "discharg[ed] a firearm that is pointed or aimed intentionally *but without malice* at another person" in violation of MCL 750.329(1) (emphasis added). "As a purely textual matter, . . . the language of the offenses is inconsistent, leading to the natural conclusion that the same person cannot be punished under both offenses for the same conduct." *Wafer*, \_\_\_ Mich at \_\_\_; slip op at 8-9. "Absent other textual indications to the contrary[,] . . . it is hard to imagine a clearer sign that the Legislature did not intend to authorize cumulative punishments for these crimes." *Id.* at \_\_\_; slip op at 9.

The statutes at issue here are very similar to those in *Wafer*. Defendant was convicted of AWIGBH, which criminalizes “[a]ssault[ing] another person *with intent to do great bodily harm*, less than the crime of murder.” MCL 750.84(1)(a) (emphasis added). He was also convicted of second-offense aggravated domestic violence under MCL 750.81a(3). Second-offense aggravated domestic violence under § 81a(3) is defined as an act of aggravated domestic violence under § 81a(2) paired with a prior conviction for the same conduct, so to violate § 81a(3), one must necessarily violate § 81a(2). Aggravated domestic violence is defined as having attacked a domestic partner “without a weapon and inflict[ing] serious or aggravated injury upon that individual *without intending to commit murder or to inflict great bodily harm less than murder . . .*” MCL 750.81a(2) (emphasis added). If defendant is guilty of having assaulted his victim with intent to do great bodily harm less than murder, he cannot also have assaulted his victim *without* intending to inflict great bodily harm less than murder. As in *Wafer*, the language of the offenses is inconsistent, which should lead to the natural conclusion that the same person cannot be punished under both offenses for the same conduct. In my view, it is hard to imagine a clearer sign that the Legislature did not intend to authorize cumulative punishments for these crimes.

I readily acknowledge that what distinguishes these statutes from those at issue in *Wafer* is that there is, at least arguably, a textual indication to the contrary. The AWIGBH statute provides that “[t]his section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section.” MCL 750.84(3). I do not believe this language should derogate from the clear sign provided by the Legislature that it did not intend to authorize cumulative punishments for these crimes. Its actual text does not speak to this situation. In *Wafer*, the obstacle to convicting the defendant of both second-degree murder and statutory manslaughter was not anything in the murder statute; rather, it was the language in the manslaughter statute stating that the offense was committed if the defendant acted “without malice.” Similarly, in this case a conclusion that the same criminal act cannot sustain a conviction for both AWIGBH and aggravated domestic violence does not depend on anything in the AWIGBH statute, but rather language in the domestic violence statute that is incompatible with that conviction. In other words, the AWIGBH statute says that *this section* does not prohibit a person from being convicted of another violation of law arising out of the same conduct, but on these facts it would not be *this section* (the AWIGBH statute) that prohibits the cumulative conviction, but rather the aggravated domestic violence section, which requires that the defendant have acted “without intending . . . to inflict great bodily harm less than murder.”

I also question whether the disclaimer in § 84(3) remains meaningful under our current approach to these double-jeopardy principles. It appears to me that this language

first appeared in our statutes when the Legislature criminalized taking a weapon from a peace officer. See 1994 PA 33. That enactment also included the statement that “[t]his section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section.” MCL 750.479b(3). But at that time, our test for whether the same conduct could be held to violate separate statutes asked whether the “[s]tatutes prohibit[ed] conduct that is violative of distinct social norms . . . .” *People v Robideau*, 419 Mich 458, 487 (1984). If an individual attacked a police officer and stole his service pistol, for example, the language made clear that the assault and the theft were violations of “distinct social norms” and could be punished cumulatively. The language appears to have subsequently become boilerplate that the Legislature uses. See MCL 750.50c(8); MCL 750.81d(5); MCL 750.495a(4); MCL 750.120a(5); MCL 750.436(5); MCL 750.479(6); MCL 750.16(7); MCL 750.18(9); MCL 333.17764(8); MCL 750.520n(3); MCL 722.642(8); MCL 750.234a(3); MCL 750.234b(8); see also MCL 436.1904(4). But *Robideau* is no longer the law. See *People v Smith*, 478 Mich 292, 315 (2007). Now, to decide whether cumulative punishments are allowed, we ask whether the Legislature has clearly authorized them, and if it has not, we look to the abstract elements of the offenses to see whether each crime has an element that the other lacks. *Id.* at 316. Under *Robideau*, if the courts determined that two criminal statutes prohibited conduct that was violative of the same social norm, the existence of a conviction under one statute precluded a conviction under the other. Under *Smith*, it is not the existence of a conviction that could preclude a conviction under some other statute, but rather the text of the particular statutes at issue. This disclaimer appears to me to be responsive to a multiple-punishments test the courts no longer are using.

Here, as in *Wafer*, I believe the language in MCL 750.81a(2) is a clear expression of legislative intent that the same act cannot violate both that section and MCL 750.84(1)(a). Because the expression of legislative intent is clear, it is not necessary to analyze the abstract elements of the offenses. I do not believe the disclaimer in § 84(3) undermines this conclusion, and I would therefore set aside defendant’s conviction for aggravated domestic violence, meaning that I dissent from the Court’s decision to deny leave to appeal.



t0308

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 11, 2022

Clerk